[redacted]301

In the Supreme Court of the United States

October Term, 1938.

EDWARD C. TWIST, Petitioner,

vs.

PRAIRIE OIL & GAS COMPANY, Respondent.

Petition for Review on Writ of Certiorari, and Brief in Support Thereof.

JAMES L. WATSON,
D. HADEN LIBERMANN,
PAUL PINSON,
Attorneys for Petitioner.

INDEX.

PAGE

Petition for Review on Writ of *Certiorari*..... 1

Brief in Support of Petition for Writ of *Certiorari*.... 7

The opinion establishes a rule of law in conflict with the rule of law announced by the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals..... 7

The decision involves an important question of federal law which has not been, but should be, settled by this court..... 13

The decision is in conflict with the decisions of the Supreme Court of Oklahoma, and involves property rights of value within the jurisdiction of that court..... 19

AUTHORITIES CITED.

PAGES

Act May 27, 1908 (35 Stat. L. 312), Sec. 5..... 22

Act May 27, 1908, Sec. 6..... 19, 22

Ashland Waterworks Co. v. *City of Ashland*, 215 Fed. 492..... 9

Audit Co. v. *City of Louisville*, 185 Fed. 349..... 9

Balkham v. *Woodstock Iron Co.*, 154 U. S. 177..... 21

Barnes v. *Winona Oil Co.*, 83 Okl. 253, 200 Pac. 985..... 22

Barnett v. *Kunkel*, 259 Fed. 394..... 21

Becker Franz Co. v. *Shannon Co.*, 256 Fed. 522..... 8, 9, 10

Bispham's Prin. of Eq., (8th ed.) Sec. 31..... 8

Black, Rescission and Cancellation, Vol. 2, Sec. 655..... 8

Carlile v. *National Oil & Development Co.*, 83 Okl. 217, 201 Pac. 377..... 21

Chanslor Canfield Co. v. *U. S.*, 266 Fed. 145..... 8, 10

Commercial Bank v. *Buckingham*, 5 How. 317, 12 L. ed. 169..... 21

9th Corpus Juris, p. 1160..... 8

Enc. U. S. Supreme Ct. Rep., Vol. 5, p. 826..... 9

Equity Rules 22 and 23..... 9, 14, 17

AUTHORITIES—Continued.

PAGES

Fau v. *Hill*, 249 Fed. 415 (8th Cir. Ct. Appls.) 8, 9, 13, 18

Ford v. *Grimmett*, 278 Fed. 140 18

Freeling v. *Kight*, 49 Okl. 202, 152 Pac. 362 20

Freeport Water Co. v. *Freeport*, 180 U. S. 587 21

General Film Co. v. *Sampliner*, 252 Fed. 444 8

Goat v. *U. S.*, 224 U. S. 458 22

Green v. *Turner*, 98 Fed. 256 9

Hansell v. *Purnell*, 1 Fed. (2nd) 266 . . . . . 9, 12, 18

Hapgood v. *Berry*, 157 Fed. 807 9

Heckman v. *U. S.*, 224 U. S. 413 22

Indian Land & Trust Co. v. *Shoenfeldt*, 135 Fed. 484 . . . 15

Judicial Code, Secs. 274a and 274b 14, 16, 17

Kellogg v. *Schaeble*, 273 Fed. 1012 8

Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349 21

Leffingwell v. *Warren*, 67 U. S. 599 21

Liberty Oil Company v. *Condon National Bank*, 260 U. S. 235, 67 L. ed. 232 . . . . . 13, 16, 22

Messenger v. *Anderson*, 225 U. S. 436 21

National Leather Co. v. *Roberts*, 221 Fed. 922 9

Oklahoma Constitution, section 2, article 7 19

Pacific Coal & Transportation Co. v. *Pioneer Mining Co.*, 205 Fed. 577, 9th C. C. A. 9, 12, 18

Perego v. *Dodge*, 163 U. S. 161, 41 L. ed. 113 9

Report Commissioner Indian Affairs, 1914, pp. 50-55 . . . 19

Sayers v. *Burkhardt*, 85 Fed. 246 8

St. L. & S. F. Railroad Co. v. *Quinette*, 251 Fed. 773 . . . 21

Standard Oil Co. v. *Missouri*, 224 U. S. 270 21

Story, Equity Jr., (14th ed.) Vol. 2, Secs. 932 933 8

Truskett v. *Closser*, 236 U. S. 223 . . . . . 19, 22

Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co.*, 260 Fed. 724 . . . . . 8, 9, 11

Vidal v. *Co.*, 276 Fed. 856-7, 2nd C. C. A., syl., par. 13 . . . 18

Winona Oil Co. v. *Barnes*, 83 Okl. 248, 200 Pac. 981 21

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. . . . . .

EDWARD C. TWIST, *Petitioner,*

vs.

PRAIRIE OIL & GAS COMPANY, *Respondent.*

PETITION FOR REVIEW ON WRIT OF *CERTIORARI.*

To the Honorable,

The Supreme Court of the United States:

Edward C. Twist, petitioner, respectfully shows to this honorable court that on August 3, 1922, he filed in the District Court for Tulsa County, Oklahoma, his petition against the Prairie Oil & Gas Company, which, by proper proceedings, was removed to the United States Court for the Eastern District of Oklahoma, on September 15, 1922, and there docketed *by respondent* as No. 2930 *Equity*.

In the first cause of action it was alleged:

"(1) The petitioner was a Cherokee Indian. Certain land in Tulsa County, Oklahoma, allotted to him, was during his

minority leased by his guardian for oil and gas mining purposes to the Los Angeles-Cherokee Oil & Gas Company. This lease remained in force until March 21, 1920, when it expired by its terms.

(2) On June 5, 1916, while that lease was in force, and while oil was being produced in paying quantities, the lessee instituted proceedings in the County Court of Tulsa County, seeking and obtaining an extension of the terms of said lease for as long as oil and gas was produced in paying quantities from the leased premises. Thereafter the original and the "new" or "extension" lease were assigned to the respondent.

(3) That the proceedings in the Tulsa County Court, whereby said "new" or "extended" lease was obtained were void, because: *(a)* no opportunity was given for bids by others than the lessee; *(b)* the property was not sold at public auction; *(c)* the property was sold in bulk, together with property of other minors; *(d)* the proceedings were in violation of Rule Nine of the Supreme Court of Oklahoma, which provides that such lease shall be sold only in open court to the highest and best responsible bidder, and that notice of such sale must be given by posters, and by publication, where publication is practicable; *(e)* the lease was obtained by fraud, duress and false dealing, and for a grossly inadequate consideration.

(4) That the defendant thereafter entered upon the premises and withdrew oil and gas continuously.

The prayer was for damages for defendant's trespass since the expiration of the original lease.

The second cause of action sought cancellation of the "new" or "extended" lease as a title cloud, injunction against the trespass, and the quieting of plaintiff's title.

The joinder of these causes of action was appropriate under the Oklahoma Code.

Respondent answered, denying contravention of Rule 9, traversing the allegations of fraud, alleging a bona fide purchase for value, and admitting the substance of the petition otherwise.

The prayer of the answer was: *(1)* That the plaintiff's petition be dismissed for *want of equity; (2)* that the *title of respondent be declared valid and quieted.*

Petitioner filed reply, putting the whole case squarely in equity (R. 32), denying respondent's good faith and the jurisdiction of the County Court to enter the order approving the "new" or "extended" lease.

On April 27, 1923, the court entered a decree (omitting formal parts) as follows:

> "And the court being now fully advised in the premises, finds all the issues, and concludes in favor of the defendant.
>
> "It is, therefore, ordered, adjudged and decreed as follows, *viz:*
>
> "That the plaintiff's petition be, and it is hereby, *dismissed for want of equity*, at his costs.
>
> "It is further ordered, adjudged and decreed that the defendant is the owner of, and has a good and valid title to, an oil and gas mining lease on the * * * (description of land) * * * for a period extending so long as oil or gas is produced from said land, the *defendant's title to which is hereby quieted and confirmed* as against the claims of the plaintiff."

In the trial court the facts pertaining to the profits derived from the leases, for accounting, and the formal proceedings to secure the "new" or "extended" lease, were submitted by stipulation (R. 35). Upon the allegations of fraud, false dealing and inadequacy of consideration, testimony was offered.

On June 23, 1923, an appeal was allowed, and thereafter filed in the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis. The cause was entered and docketed in said court as No. 6500, and consolidated for presentation with certain other cases, in one of which (No. 6499) petition for writ of *certiorari* is also submitted. The complete record referred to is No. 6499.

On the 9th day of May, 1925, the Circuit Court of Appeals rendered its decision, holding that the action in the trial court was at law; and, because it was tried to the court without written waiver of a jury, refusing to consider the errors assigned, which were as follows:

(1) Admitting evidence;

(2) Excluding evidence;

(3) Refusing to enter judgment for plaintiff;

(4) Making findings not supported by the evidence;

(5) Refusing to make other findings.

The decree of the trial court was affirmed. Thereafter, petitioner filed his petition for rehearing, which was denied on the 2nd day of December, 1925.

A transcript of the record in the case, including the proceedings in the Eighth Circuit Court of Appeals, accompanies this petition.

Your petitioner is advised and believes that the judgment of the Circuit Court of Appeals, though made final in said cause by the Judicial Code, is, nevertheless, erroneous, and that this honorable court should require the case to be certified to it for review and determination, in conformity with the provisions of the Judicial Code, for the following reasons:

(1) The decision is in conflict with a rule of law announced by the Ninth Circuit Court of Appeals, and the Sixth Circuit Court of Appeals.

(2) The decision involves an important question of federal law which has not been, but should be, settled by this court.

(3) The decision is in conflict with decisions of the Supreme Court of Oklahoma, and involves property rights of value within that state.

All of which matters are more fully set forth in a brief appended to this petition.

Wherefore, your petitioner respectfully prays that writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the cause entitled, *Edward C. Twist, Appellant*, v. *Prairie Oil & Gas Company, Appellee*, No. 6500, to the end that the said case may be reviewed and determined by this court as provided by the Judicial Code; or that your petitioner may have such other and further relief in the premises as this

court may deem appropriate and in conformity with the provisions of law; and that the judgment of the said Circuit Court of Appeals, affirming the judgment of the trial court, and every part thereof, may be reversed by this honorable court and an appropriate judgment rendered therein.

Edward C. Twist

EDWARD C. TWIST, *Petitioner,*

James S. Watson

By JAMES S. WATSON,

D. Hayes Linebaugh

D. HAYES LINEBAUGH,

Paul Pinson

PAUL PINSON,

Attorneys for Petitioner.

State of Oklahoma,
County of Muskogee.

Paul Pinson, being first duly sworn, upon oath states that he is one of counsel for the petitioner herein and is acquainted with all of the proceedings had in the above entitled and numbered cause and is familiar with the contents of the foregoing petition, and the facts stated in said petition are true to the best of his knowledge and belief.

Paul Pinson

PAUL PINSON.

Subscribed and sworn to before me this the 26th day of January, 1926. E. K. Folsom, Notary Public. (Seal) My commission expires September 15, 1927.

E. K. Folsom

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

The opinion establishes a rule of law in conflict with the rule of law announced by the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals.

Petitioner, the undisputed owner of land, sued for damages for continuing trespass, for cancellation of recorded conveyances as clouds upon his title, injunction and quieting of title (R. 1). In its answer respondent sought a decree dismissing plaintiff's petition for want of equity and quieting its title (R. 28). Respondent docketed the case as in equity and at the trial stated "this now is a suit in equity" (R. 37). The facts upon which an accounting (obviously necessary) could be had, and all other facts pertaining to the decision, except on the question of fraud and inadequacy of consideration, were stipulated (R. 35). The parties treated the case as in equity. The trial court so treated it. The decree granted equitable relief only (R. 33).

The Court of Appeals, affirming the decree, say:

> "The assignments of error disclose that claim is made that the court erred *(1)* in admitting evidence; *(2)* in excluding evidence; *(3)* in refusing to enter judgments for plaintiffs; *(4)* in making findings not supported by the evidence; *(5)* in refusing to make other findings.
>
> "None of these assignments can be considered by this court in view of the form of trial had in the court below. * * *
>
> "It is true that the effect of the trial procedure was not raised in the trial court, nor has it been ar-

gued here, but it is the duty of this court to take note of it.

* * * * * * *

"The pleadings being sufficient to support the judgments in the several cases, the judgments are affirmed."

We contend that this was a suit in equity. If so, the Circuit Court is in error by its own opinion.

Equity has jurisdiction to cancel deeds, leases and contracts, to enjoin against continuing trespass and waste, and to quiet title. These are established equitable remedies.

—*Kellogg* v. *Schaeble*, 273 Fed. 1012;
Fay v. *Hill*, 249 Fed. 418 (8th Cir. Appls.);
Black, Rescission and Cancellation, Vol. 2, Sec. 655;
General Film Co. v. *Sampliner*, 252 Fed. 444;
Sayers v. *Burkhardt*, 85 Fed. 246;
Chanslor Canfield Co. v. *U. S.*, 266 Fed. 145;
Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co.*, 260 Fed. 724;
Becker Franz Co. v. *Shannon Co.*, 256 Fed. 522;
Bispham's Prin. of Eq. (8th ed.), Sec. 31;
Story, Equity Jr., (14th ed.) Vol. 2, Secs. 932-933;
9th Corpus Juris, p. 1160.

The remedy at law was in the plaintiff, for possession and to recover damages, but it was "not adequate, by no means as practical and efficient as a remedy in equity."

—*Chanslor Canfield Co.* v. *U. S.*, *supra* (9th Circuit Court of Appeals).

If a court of equity has jurisdiction, it may also dispose of the legal title.

—*Chanslor Canfield Co.* v. *U. S.*, *supra*;

Becker Franz Co. v. *Shannon Co., supra* (9th Circuit Court of Appeals);
Equity Rule 23.

Even if the remedy at law be deemed adequate, equity may proceed in the absence of objection. It is not a question of jurisdiction, but of procedure, which may be waived.

—Enc. U. S. Supreme Ct. Rep., Vol. 5, p. 826;
Perego v. *Dodge*, 163 U. S. 161, 41 L. ed. 113;
Ashland Waterworks Co. v. *City of Ashland*, 215 Fed. 492;
National Leather Co. v. *Roberts*, 221 Fed. 922;
Audit Co. v. *City of Louisville*, 185 Fed. 349;
Hapgood v. *Berry*, 157 Fed. 807;
Green v. *Turner*, 98 Fed. 256;
Becker Franz Co. v. *Shannon Co., supra;*
Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co., supra;*
Pacific Coal & Transportation Co. v. *Pioneer Mining Co.*, 205 Fed. 577, 9th C. C. A.;
Fay v. *Hill*, 249 Fed. 415, 8 C. C. A.;
Hansell v. *Purnell*, 1 Fed. (2nd) 266.

And the fact that an action for damages for trespass was included in the plaintiff's bill, does not oust equity of jurisdiction.

—*Becker Franz Co.* v. *Shannon Co., supra;*
Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co., supra;*
Chanslor Canfield Co. v. *U. S., supra.*

For the court's convenience we quote pertinent passages from the opinions cited.

Becker Franz Company v. *Shannon Copper Co.*, (Ninth Circuit Court of Appeals):

"We think the rule to be followed in the Federal Courts is that where, as in the present case, no objection is raised in the trial court to the disposition of the question of the legal title by a court of equity, the objection is waived so far as the appellate court is concerned. (*Elder* v. *McClaskey*, 70 Fed. 529, 17 C. C. A. 251; *Certiorari Denied*, 163 U. S. 685; *Reques* v. *Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. ed. 934.)"

Chanslor Canfield Co. v. *U. S.*, (9th Circuit Court of Appeals):

Here the court, considering Equity Rules 22 and 23, and section 274a of the Judicial Code, dealt with a situation substantially similar to the case at bar. The United States, undisputed owner of land, brought suit to enjoin a continuing trespass by the company which was removing oil therefrom. The company moved to transfer the case to the law side of the court. The defendant's answer alleged that the United States was not in possession, and that the action was in ejectment.

HUNT, Circuit Judge, in the opinion (p. 147) said:

"Remedy at law for possession and to recover damages for the trespass is in plaintiff, but such remedy is not adequate, by no means as practical and efficient as a remedy in equity. (*Magruder* v. *Belle Fourche, etc., Association*, 219 Fed. 72, 135 C. C. A. 524. In *Johnston* v. *Carson G. M. Co.*, 157 Fed. 145, 84 C. C. A. 593, 15 L. R. A. (N. S.) 1078, there was a serious controversy as to title, hence the case is distinguished from the instant one.

"There is no controversy as to where the legal title to the property here involved rests, and if the defendants have no right to the oil in the lands or to the

possession thereof as against the United States, then certainly remedy at law is inadequate to prevent injury of an irreparable character being done to the land, even to the destruction of the value thereof."

Though timely motion was made to transfer, equity rightfully retained jurisdiction. The decree of the District Court for injunction, for damages for trespass, and that all improvements be turned over to the United States (in effect, ejectment), was affirmed.

Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co.* (9th Circuit Court of Appeals):

"The original complaint in which the Twenty-one Mining Company was named as sole defendant contains all the essential averments of a bill to quiet title to said vein. * * * It is true that plaintiff has commenced an action at law against the defendant, but such action was not, as alleged, to recover possession of the property in dispute, but solely to recover damages for trespass thereon."

This is exactly the status of the case at bar. The only judgment sought in the plaintiff's first cause of action was a judgment for damages for the trespass.

(p. 727) "The defendants were seeking affirmative relief and the cause was submitted by all parties, not as one already determined by verdict or judgment in the action at law, or as depending upon the result of that action, but as *res integra*, upon which the independent judgment of the court was sought and which was to be decided, not upon the evidence adduced in the law case alone, but upon other additional and independent testimony as well. * * *

"It is not a case here of conferring jurisdiction on the court in a matter not of equitable cognizance. The court, as a court of equity, had and has jurisdiction

to quiet title; the bill contains all the allegations necessary for that purpose, all the parties were properly before the court, and all acquiesced in the method of procedure. In such case neither party will be permitted, by the temporary withholding of objections until after the court has announced its decision, to place himself in such advantageous position that, winning, he can accept the fruits of victory, or, losing, escape the burdens of defeat. The decree appealed from therefore cannot be disturbed for lack of jurisdiction."

Hansell v. *Purnell* (6th Circuit Court of Appeals):

"Defendants, who by a cross bill invoke the equity jurisdiction of the court in relation to the same transactions to which the complainant's bill relates and pray for equitable relief, are estopped to deny equity jurisdiction."

Pacific Coal & Transportation Co. v. *Pioneer M. Co.* (9th C. C. A.):

"Now, the allegations of plaintiff's complaint show the action to be equitable. The defendants' denial of possession on the part of the plaintiff cannot oust the court of equity of jurisdiction. If the denial was substantiated at the trial, the issues there remaining, it would defeat the action, because plaintiff would not then have maintained its cause. But another feature is injected into the controversy here, which is controlling. The defendants have not only joined issue with the plaintiff touching the equitable cause as pleaded, but they have set up a like cause, and pray equitable relief, and at the same time they have interposed one or more equitable defenses. By so doing they have waived their objection to the equitable jurisdiction and cannot now be heard to insist upon the legal remedy. *Levi* v. *Evans*, 57 Fed. 677, 6 C. C. A. 580; *Hook* v. *Justice Min. Co.*, (C. C.) 58 Fed. 827 * * *" (and other cases).

In *Fay* v. *Hill* (8th C. C. A.) it is held that failure to move to transfer a bill to the law side on the ground that there is a complete and adequate remedy at law, and proceeding to a hearing, is a waiver of the objection. (Syllabus, paragraph 2.) Also, that where an equitable defense is interposed in an action at law, it will have to be disposed of by the court sitting as a chancellor before the trial of the action at law to the jury. And also, a court of equity, having obtained jurisdiction of a suit wherein cancellation of contract for sale was sought, will retain the jurisdiction to dispose of *all controversies between the parties* arising out of the transaction.

Respondent has waived the right to object and is estopped by its actions to raise the question that the plaintiff's action was at law. This is the clear pronouncement of the cases cited.

Can the appellate court disregard the waiver, revoke the estoppel, and refuse to determine the question presented, for the reasons assigned?

II.

The decision involves an important question of federal law which has not been, but should be, settled by this court.

The question is substantially as stated in the closing paragraph of the last proposition. No definite pronouncement of this court is found, unless it be in *Liberty Oil Co.* v. *Condon Bank*, hereafter referred to.

Stated otherwise, the question is the application of sections 274a and 274b, and Equity Rule 22, to the facts at bar. We respectfully urge that this court should deter-

mine whether the transfer of causes contemplated can be accomplished by the appellate courts.

Section 274a is in these words:

"In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form." (38 Stat. at L. 956.)

Section 274b:

"In all actions at law, equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same right in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree shall be regulated by rule of court. Whether such review be sought by writ of error or appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

Equity Rule 22:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the

> law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

By the petition, answer and reply, in our case the jurisdiction of equity was invoked. By the decree, equitable remedies alone were supplied. If this was not an equity case, nevertheless the defendant has waived the right to raise the question. Now, if it can be raised by the appellate court for the first time, *sua sponte*, Equity Rule 22 and section 274a are mere pitfalls to entrap the unwary litigant. The spirit of this section and rule is emphatically non-technical, yet it would be better to repeal them if they contemplate a transfer by the appellate court. Substantially, that is what the Circuit Court of Appeals accomplished here—a transfer from equity to law.

From *Indian Land & Trust Co.* v. *Shoenfeldt*, 135 Fed. 484, we quote:

> "Prior to this enactment [Rule 22] a suit erroneously commenced on the equity side must be dismissed on motion of defendant or by the court. * * *
>
> "When a court of equity had no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised."

Under the rule, however, if the opinion of the Eighth Circuit Court is correct, when a case is erroneously docketed and tried in equity, no opportunity is afforded to refile when the error is discovered. The appellate court determines the one question, that the litigant s e l e c t e d the

wrong branch of the court, and the case is at an end. This is one error of the trial court which can operate to the disadvantage of the losing party only, and for which the decision is not reversed, but affirmed.

However, if "a suit in equity should have been brought at law" under section 274a, "any party should have the right, *at any stage of the proceedings*, to amend his pleadings" to obviate that objection. If this right had been granted us, the only amendment essential was that established by the trial court's decree—the dismissal of the bill. Then both parties would have been before the court on the prayers to quiet title. One or the other was in possession, therefore equity was the proper remedy. No such opportunity could be afforded us in the appellate court, because "the cause shall proceed and be determined upon such amended pleadings." Clearly the transfer must be made in the District Court, and if not so made, the consequent questions of procedure are waived.

It is important that this court determine the question whether this rule and these sections shall be construed to simplify or to complicate federal practice.

Liberty Oil Company v. *Condon National Bank*, 260 U. S. 235, 67 L. ed. 232, is persuasive that the present decision of the Circuit Court of Appeals is erroneous. The Eighth Circuit Court of Appeals held (271 Fed. 928) that the action was a suit at law, and that, as the bill of exceptions showed no special findings of fact in a cause in which a jury had been waived, but only a general finding for the interveners, the court would not consider the sufficiency of the evidence to sustain the finding. The action was docketed as at law, for money had and received. The defendant

bank, claiming to be a mere stakeholder, asked that other persons be brought in as defendants, and their rights adjudicated. The opinion by Mr. Chief Justice TAFT states that "its answer and cross petition became an equitable defense and a prayer for affirmative equitable relief in the nature of a bill for interpleader."

After citing section 274b of the Judicial Code, the opinion proceeds:

> "This section applies to the case before us. The proceeding was changed by defendant's answer and cross petition from one at law to one in equity, *with all the consequences flowing therefrom.*"

The court suggests that a better practice would have been to transfer the cause to the equity docket as provided conversely in Rule 22. But the failure to transfer did not change the equitable character of the case which "it had taken on by the answer and cross petition of the defendant. The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction between proceedings in law and equity is abolished, and remedies at law and in equity are available to parties in the same court and the same cause." *In other words, the suit was an equitable action because the answer of the defendant made it so.*

The opinion then points out that while these sections (274a and 274b) of the Judicial Code "did not create one form of civil action as do the codes of procedure in the states," yet they

> "manifest a purpose on the part of Congress to change from a suit at law to one in equity, and the reverse,

with as little delay and as little insistence on form as possible, and are long steps toward code practice.

"Coming now to apply those two sections thus construed to the case before us, we find that by defendant's answer and the court's order it became a bill of interpleader in equity. Thereafter the proceedings should have been so treated, both in the trial and appellate courts. The chancellor, having sustained a bill of interpleader, disposed of the controversy between the claimants by directing any method of trial which would best and expeditiously accomplish justice in the particular case (citing cases). This well established rule takes the issues here to be tried out of that class of issues in which there must have been a jury trial under the Seventh Amendment. Where it was one which the chancellor could readily dispose of in one proceeding, it was in the interest of economy, expediency and justice that he should have done so. This is in accord with the general rule in equity embodied in Equity Rule 23, that jurisdiction once assumed should be maintained to the end of the litigation (citing cases)."

This is in accord with the decisions in:

Hansell v. *Purnell*, 1 Fed. (2nd) 266, 8th C. C. A.;

Pacific Coal & Transportation Co. v. *Pioneer Mining Co.*, 205 Fed. 577, 9th C. C. A.;

Vidal v. *Co.*, 276 Fed. 856-7, 2nd C. C. A., syllabus, par. 13;

Fay v. *Hill* 249 Fed. 415, 8th C. C. A.

We also call attention to the agreed statement of fact in the instant case, which presented for the appellate court a question of law, and not of fact.

—*Ford* v. *Grimmett*, 278 Fed. 140.

III.

The decision is in conflict with the decisions of the Supreme Court of Oklahoma, and involves property rights of value within the jurisdiction of that court.

The petitioner, a Cherokee Indian allottee, was a ward of the United States and restricted during his minority.

—*Truskett* v. *Closser*, 236 U. S. 223.

The power to lease, on the date specified, was conferred by section 6 of the Act of May 27, 1908 (35 Stat. at L. 312), on the probate courts of the state. These courts become federal instrumentalities for the removal of this restriction, but the procedure for leasing was to be prescribed by the state alone. The right to regulate procedure includes the power to enforce compliance, and implies jurisdiction to determine the effect of non-compliance.

Section 2, article 7, of the Oklahoma Constitution, is in part as follows:

> "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law."

By request of the Interior Department of the United States (see report, Commissioner Indian Affairs, 1914, pp. 50-55) the Supreme Court of Oklahoma promulgated certain rules for the control of the probate courts, Rule 9 being in these words:

> "No oil and gas or other mineral lease covering lands belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed at least five

days before the same are sold, as provided herein, and notice of such sale must be given by posting and by publication, where publication is practicable, and shall be on ..... of each ....."

In October, 1915, the rules were construed by the Supreme Court of Oklahoma. They were said to be local statutes, of the same effect as if enacted by the legislature. It was held that the probate courts had no power or authority, that is to say, no jurisdiction, to ignore or dispense with these rules.

—*Freeling* v. *Kight*, 49 Okl. 202, 152 Pac. 362.

The extension leases here involved were taken in 1916 (R. 23). The local law at that time as announced in *Freeling* v. *Kight*, was in force, and known to respondent. Yet Rule 9 was deliberately violated in that *(1)* no public sale was had to the highest and best bidder; and *(2)* the so-called notice of sale, instead of giving the unqualified announcement that a sale would be conducted on a given date, announced that a hearing would then be held to determine the question of the propriety of such a sale.

At the time the "notice of sale" was posted, no order of sale had been made. No notice could be given till the authority had been granted. The casually interested investor must have been misled by the notice and competition thus prevented. The reason is obvious. The properties (in all the cases) were purchased for $18,000.00; they were sold shortly after for $250,000.00. All arrangements for the sale, even to the smallest detail, were made prior to the filing of the petition. The record does not disclose a public sale, but a mere confirmation by the court of the former private agreement.

Such sales are held absolutely void as against the public policy of the State of Oklahoma, in

Winona Oil Co. v. *Barnes*, 83 Okl. 248, 200 Pac. 981;
Carlile v. *National Oil & Development Co.*, 83 Okl. 217, 201 Pac. 377.

It is held that the probate courts have no jurisdiction to order or confirm a transaction of this character.

The federal courts are bound by the local construction of state laws, especially when the interpretation antedates the transaction involved, and this is particularly true where the jurisdiction of inferior state tribunals is the subject in question.

Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349;
St. L. & S. F. Railroad Co. v. *Quinette*, 251 Fed. 773;
Messenger v. *Anderson*, 225 U. S. 436;
Barnett v. *Kunkel*, 259 Fed. 394;
Commercial Bank v. *Buckingham*, 5 How. 317, 12 L. ed. 169;
Balkham v. *Woodstock Iron Co.*, 154 U. S. 177;
Leffingwell v. *Warren*, 67 U. S. 599;
Standard Oil Co. v. *Missouri*, 224 U. S. 270;
Freeport Water Co. v. *Freeport*, 180 U. S. 587.

In a sense Rule 9 is a federal restriction upon the alienation of Indian land. The sovereign guardian of the petitioner procured its enactment by the state court. It was designed to prevent the existence of the situation here presented. It should therefore be so construed as to destroy the evil at which it was aimed. It is of no value unless its violation shall invoke a penalty. The penalty prescribed is

not confiscatory, since the decisions require reimbursement for the expense of development.

—*Barnes* v. *Winona Oil Co.*, 83 Okl. 253, 200 Pac. 985.

Conveyances violating federal restrictions generally are held void, and this should furnish an additional reason for following the local decisions here.

—Act May 27, 1908, Sec. 5;
Truskett v. *Closser, supra;*
Heckman v. *U. S.*, 224 U. S. 413;
Goat v. *U. S.*, 224 U. S. 458.

As shown by the record, the amount involved is such that it is probable either party will seek a final decision by this court. If the cause shall be remanded to the Circuit Court with instructions to determine the merits, the litigation will be unduly prolonged. Therefore, we urge in the interest of expediency that the matter be heard and determined on its merits by this court in the present state of the record.

—*Liberty Oil Co.* v. *Condon National Bank, supra.*

Respectfully submitted,

James S. Watson,
D. Haden Linebaugh,
Paul Pinson,
Attorneys for Petitioner.

Office Supreme Court, U. S.
FILED
FEB 17 1908
WM. R. STANSBURY
Clerk

No. 302

In the Supreme Court of the United States

October Term, 1907.

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *nee* TWIST, *Petitioners*,

vs.

PRAIRIE OIL & GAS COMPANY, *Respondent*.

Petition for Review on Writ of *Certiorari*, and Brief in Support Thereof.

JAMES S. WATSON,
D. HADEN LIVERAUGH,
PAUL PERSON,
Attorneys for Petitioners.

INDEX.

PAGE

Petition for Review on Writ of *Certiorari*..... 1

Brief in Support of Petition for Writ of *Certiorari*.... 7

The opinion establishes a rule of law in conflict with the rule of law announced by the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals..... 7

The decision involves an important question of federal law which has not been, but should be, settled by this court..... 13

The decision is in conflict with the decisions of the Supreme Court of Oklahoma, and involves property rights of value within the jurisdiction of that court..... 19

AUTHORITIES CITED.

PAGES

Act May 27, 1908 (35 Stat. L. 312), Sec. 5..... 22

Act May 27, 1908, Sec. 6..... 19, 22

Ashland Waterworks Co. v. *City of Ashland*, 215 Fed. 492..... 9

Audit Co. v. *City of Louisville*, 185 Fed. 349..... 9

Balkham v. *Woodstock Iron Co.*, 154 U. S. 177..... 21

Barnes v. *Winona Oil Co.*, 83 Okl. 253, 200 Pac. 985.. 22

Barnett v. *Kunkel*, 259 Fed. 394..... 21

Becker Franz Co. v. *Shannon Co.*, 256 Fed. 522.....8, 9, 10

Bispham's Prin. of Eq., (8th ed.) Sec. 31..... 8

Black, Rescission and Cancellation, Vol. 2, Sec. 655..... 8

Carlile v. *National Oil & Development Co.*, 83 Okl. 217, 201 Pac. 377..... 21

Chanslor Canfield Co. v. *U. S.*, 266 Fed. 145.....8, 10

Commercial Bank v. *Buckingham*, 5 How. 317, 12 L. ed. 169..... 21

9th Corpus Juris, p. 1160..... 8

Enc. U. S. Supreme Ct. Rep., Vol. 5, p. 826..... 9

Equity Rules 22 and 23.....9, 14, 17

AUTHORITIES—Continued.

PAG

Fau v. *Hill*, 249 Fed. 415 (8th Cir. Ct. Appls.) 8, 9, 13,
Ford v. *Grimmett*, 278 Fed. 140 .....
Freeling v. *Kight*, 49 Okl. 202, 152 Pac. 362 .....
Freeport Water Co. v. *Freeport*, 180 U. S. 587 .....
General Film Co. v. *Sampliner*, 252 Fed. 444 .....
Goat v. *U. S.*, 224 U. S. 458 .....
Green v. *Turner*, 98 Fed. 256 .....
Hansell v. *Purnell*, 1 Fed. (2nd) 266 .....9, 12,
Hapgood v. *Berry*, 157 Fed. 807 .....
Heckman v. *U. S.*, 224 U. S. 413 .....
Indian Land & Trust Co. v. *Shoenfeldt*, 135 Fed. 484 ...
Judicial Code, Secs. 274a and 274b. 14, 16,
Kellogg v. *Schaneble*, 273 Fed. 1012 .....
Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349 .....
Leffingwell v. *Warren*, 67 U. S. 599 .....
Liberty Oil Company v. *Condon National Bank*, 260 U. S. 235, 67 L. ed. 232 .....13, 16,
Messenger v. *Anderson*, 225 U. S. 436 .....
National Leather Co. v. *Roberts*, 221 Fed. 922 .....
Oklahoma Constitution, section 2, article 7 .....
Pacific Coal & Transportation Co. v. *Pioneer Mining Co.*, 205 Fed. 577, 9th C. C. A. 9, 12,
Perego v. *Dodge*, 163 U. S. 161, 41 L. ed. 113 .....
Report Commissioner Indian Affairs, 1914, pp. 50-55 ...
Sayers v. *Burkhardt*, 85 Fed. 246 .....
St. L. & S. F. Railroad Co. v. *Quinette*, 251 Fed. 773 ....
Standard Oil Co. v. *Missouri*, 224 U. S. 270 .....
Story, Equity Jr., (14th ed.) Vol. 2, Secs. 932-933 .....
Truskett v. *Closser*, 236 U. S. 223 19,
Twenty-one Mining Co. v. *Original Sixteen-to-one Mining Co.*, 260 Fed. 724 .....8, 9,
Vidal v. *Co.*, 276 Fed. 856-7, 2nd C. C. A., syl., par. 13 ...
Winona Oil Co. v. *Barnes*, 83 Okl. 248, 200 Pac. 981 .....

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. .....

EDWARD C. TWIST, ALBERT T. TWIST AND JESSIE L. PAYNE, *NEE* TWIST, *Petitioners,*

vs.

PRAIRIE OIL & GAS COMPANY, *Respondent.*

PETITION FOR REVIEW ON WRIT OF *CERTIORARI.*

To the Honorable,

The Supreme Court of the United States:

Edward C. Twist, Albert T. Twist and Jessie L. Payne, nee Twist, petitioners, respectfully show to this honorable court that on August 3, 1922, they filed in the District Court for Tulsa County, Oklahoma, their petition against the Prairie Oil & Gas Company, which, by proper proceedings, was removed to the United States Court for the Eastern District of Oklahoma, on September 15, 1922, and there docketed *by respondent* as No. 2929 *Equity*.

In the first cause of action it was alleged:

(1) The petitioners are Cherokee Indians. Certain land in Tulsa County, Oklahoma, allotted to William G. Twist, of whom petitioners are heirs, was during their minority leased by their guardian for oil and gas mining purposes to the Los Angeles-Cherokee Oil & Gas Company. This lease remained in force until September 29, 1919, when it expired by its terms.

(2) On June 5, 1916, while that lease was in force, and while oil was being produced in paying quantities, the lessee instituted proceedings in the County Court of Tulsa County, seeking and obtaining an extension of the terms of said lease for as long as oil and gas was produced in paying quantities from the leased premises. Thereafter the original and the "new" or "extension" lease were assigned to the respondent.

(3) That the proceedings in the Tulsa County Court, whereby said "new" or "extended" lease was obtained were void, because: *(a)* no opportunity was given for bids by others than the lessee; *(b)* the property was not sold at public auction; *(c)* the property was sold in bulk, together with property of other minors; *(d)* the proceedings were in violation of Rule Nine of the Supreme Court of Oklahoma, which provides that such lease shall be sold only in open court to the highest and best responsible bidder, and that notice of such sale must be given by posters, and by publication, where publication is practicable; *(e)* the lease was obtained by fraud, duress and false dealing, and for a grossly inadequate consideration.

(4) That the defendant thereafter entered upon the premises and withdrew oil and gas continuously.

The prayer was for damages for defendant's trespass since the expiration of the original lease.

The second cause of action sought cancellation of the "new" or "extended" lease as a title cloud, injunction against the trespass, and the quieting of plaintiffs' title.

The joinder of these causes of action was appropriate under the Oklahoma Code.

Respondent answered, denying contravention of Rule 9, traversing the allegations of fraud, alleging a bona fide purchase for value, and admitting the substance of the petition otherwise.

The prayer of the answer was: *(1)* That the plaintiffs' petition be dismissed for *want of equity; (2)* that the *title of respondent be declared valid and quieted.*

Petitioners filed reply, putting the whole case squarely in equity (R. 32), denying respondent's good faith and the jurisdiction of the County Court to enter the order approving the "new" or "extended" lease.

On April 27, 1923, the court entered a decree, the pertinent portions of which are as follows:

> "• • • And the court now being fully advised in the premises, finds the issues, and concludes, in favor of the defendant as to all the plaintiffs except Kuroki Twist and Willie V. Twist.
>
> It is therefore ordered, adjudged and decreed that defendant is the owner of an oil and gas mining lease covering an undivided eleven-fifteenths (11/15) interest in the following lands, to-wit (description) • • • extending for a period so long as oil or gas is produced

from said lands, and that its title thereto is hereby quieted and confirmed against the claims of the plaintiffs, to all of which the plaintiffs except," etc.

In the trial court the facts pertaining to the profits derived from the leases, for accounting, and the formal proceedings to secure the "new" or "extended" lease, were submitted by stipulation (R. 35). Upon the allegations of fraud, false dealing and inadequacy of consideration, testimony was offered.

On June 23, 1923, an appeal was allowed, and thereafter filed in the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis. The cause was entered and docketed in said court as No. 6489, and consolidated for presentation with certain other cases, in one of which (No. 6580) petition for writ of *certiorari* is also submitted. The complete record referred to is No. 6489.

On the 9th day of May, 1925, the Circuit Court of Appeals rendered its decision, holding that the action in the trial court was at law; and, because it was tried to the court without written waiver of a jury, refusing to consider the errors assigned, which were as follows:

(1) Admitting evidence;

(2) Excluding evidence;

(3) Refusing to enter judgment for plaintiffs;

(4) Making findings not supported by the evidence;

(5) Refusing to make other findings.

The decree of the trial court was affirmed. Thereafter, petitioners filed their petition for rehearing, which was denied on the 2nd day of December, 1925.

A transcript of the record in the case, including the proceedings in the Eighth Circuit Court of Appeals, accompanies this petition.

Your petitioners are advised and believe that the judgment of the Circuit Court of Appeals, though made final in said cause by the Judicial Code, is, nevertheless, erroneous, and that this honorable court should require the case to be certified to it for review and determination, in conformity with the provisions of the Judicial Code, for the following reasons:

(1) The decision is in conflict with a rule of law announced by the Ninth Circuit Court of Appeals, and the Sixth Circuit Court of Appeals.

(2) The decision involves an important question of federal law which has not been, but should be, settled by this court.

(3) The decision is in conflict with decisions of the Supreme Court of Oklahoma, and involves property rights of value within that state.

All of which matters are more fully set forth in a brief appended to this petition.

Wherefore, your petitioners respectfully pray that writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the cause entitled, *Edward C. Twist, Albert T. Twist, Jessie L. Payne, nee Twist, et al., Appellants*, v. *Prairie Oil & Gas*

Company, Appellee, No. 6499, to the end that the said case may be reviewed and determined by this court, as provided by the Judicial Code; or that your petitioners may have such other and further relief in the premises as this court may deem appropriate and in conformity with the provisions of law; and that the judgment of the said Circuit Court of Appeals, affirming the judgment of the trial court, and every part thereof, may be reversed by this honorable court and an appropriate judgment rendered therein.

EDWARD C. TWIST, ALBERT T. TWIST, and JESSIE L. PAYNE, nee TWIST, *Petitioners*,

By JAMES S. WATSON,
D. HADEN LINEBAUGH,
PAUL PINSON,
Attorneys for Petitioners.

State of Oklahoma,
County of Muskogee.

Paul Pinson, being first duly sworn, upon oath states that he is one of counsel for the petitioners herein and is acquainted with all of the proceedings had in the above entitled and numbered cause and is familiar with the contents of the foregoing petition, and the facts stated in said petition are true to the best of his knowledge and belief.

PAUL PINSON.

Subscribed and sworn to before me this the 26th day of January, 1926. E. K. Folsom, Notary Public. (Seal) My commission expires September 15, 1927.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

The opinion establishes a rule of law in conflict with the rule of law announced by the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals.

Petitioners, the undisputed owners of an undivided six-fifteenths interest in certain land (R. 9), sued for damages for continuing trespass, for cancellation of recorded conveyances as clouds upon title, injunction and quieting of title (R. 1). In its answer respondent sought a decree dismissing plaintiffs' petition for want of equity and quieting its title (R. 28). Respondent docketed the case as in equity and at the trial stated "this now is a suit in equity" (R. 37). The facts upon which an accounting (obviously necessary) could be had, and all other facts pertaining to the decision, except on the question of fraud and inadequacy of consideration, were stipulated (R. 35). The parties treated the case as in equity. The trial court so treated it. The decree granted equitable relief only (R. 33).

Leoria Weldy, owner of five-fifteenths interest, did not sue. The trial court found in favor of Kuroki and Willie V. Twist, owners of four-fifteenths interest.

The Court of Appeals, affirming the decree, say:

> "The assignments of error disclose that claim is made that the court erred *(1)* in admitting evidence; *(2)* in excluding evidence; *(3)* in refusing to enter judgments for plaintiffs; *(4)* in making findings not supported by the evidence; *(5)* in refusing to make other findings.

"None of these assignments can be considered by this court in view of the form of trial had in the court below. • • •

"It is true that the effect of the trial procedure was not raised in the trial court, nor has it been argued here, but it is the duty of this court to take note of it.

• • • • • • •

"The pleadings being sufficient to support the judgments in the several cases, the judgments are affirmed."

We contend that this was a suit in equity. If so, the Circuit Court is in error by its own opinion.

Equity has jurisdiction to cancel deeds, leases and contracts, to enjoin against continuing trespass and waste, and to quiet title. These are established equitable remedies.

—*Kellogg* v. *Schaeble*, 273 Fed. 1012;

Fay v. *Hill*, 249 Fed. 418 (8th Cir. Appls.);

Black, Rescission and Cancellation, Vol. 2, Sec. 655;

General Film Co. v. *Sampliner*, 252 Fed. 444;

Sayers v. *Burkhardt*, 85 Fed. 246;

Chandler Canfield Co. v. *U. S.*, 266 Fed. 145;

Twenty one Mining Co. v. *Original Sixteen to one Mining Co.*, 260 Fed. 724;

Becker Franz Co. v. *Shannon Co.* 256 Fed. 522;

Bispham's Prin. of Eq. (8th ed.), Sec. 31;

Story, Equity Jr., (14th ed.) Vol. 2, Secs. 932-933;

9th Corpus Juris, p. 1160.

The remedy at law was in the plaintiff, for possession and to recover damages, but it was "not adequate, by no means as practical and efficient as a remedy in equity."

—*Chandler Canfield Co.* v. *U. S.*, *supra* (9th Circuit Court of Appeals).

If a court of equity has jurisdiction, it may also dispose of the legal title.

—*Chanslor Canfield Co. v. U. S., supra;*

Becker Franz Co. v. Shannon Co., supra (9th Circuit Court of Appeals);

Equity Rule 23.

Even if the remedy at law be deemed adequate, equity may proceed in the absence of objection. It is not a question of jurisdiction, but of procedure, which may be waived.

—Enc. U. S. Supreme Ct. Rep., Vol. 5, p. 826;

Perego v. Dodge, 163 U. S. 161, 41 L. ed. 113;

Ashland Waterworks Co. v. City of Ashland, 215 Fed. 492;

National Leather Co. v. Roberts, 221 Fed. 922;

Audit Co. v. City of Louisville, 185 Fed. 349;

Hapgood v. Berry, 157 Fed. 807;

Green v. Turner, 98 Fed. 256;

Becker Franz Co. v. Shannon Co., supra;

Twenty-one Mining Co. v. Original Sixteen-to-one Mining Co., supra;

Pacific Coal & Transportation Co. v. Pioneer Mining Co., 205 Fed. 577, 9th C. C. A.;

Fay v. Hill, 249 Fed. 415, 8 C. C. A.;

Hansell v. Purnell, 1 Fed. (2nd) 266.

And the fact that an action for damages for trespass was included in the plaintiffs' bill, does not oust equity of jurisdiction.

—*Becker Franz Co. v. Shannon Co., supra;*

Twenty-one Mining Co. v. Original Sixteen-to-one Mining Co., supra;

Chanslor Canfield Co. v. U. S., supra.

For the court's convenience we quote pertinent passages from the opinions cited.

Becker Franz Company v. *Shannon Copper Co.*, (Ninth Circuit Court of Appeals):

> "We think the rule to be followed in the Federal Courts is that where, as in the present case, no objection is raised in the trial court to the disposition of the question of the legal title by a court of equity, the objection is waived so far as the appellate court is concerned. (*Elder* v. *McClaskey*, 70 Fed. 529, 17 C. C. A. 251; *Certiorari Denied*, 163 U. S. 685; *Reynes* v. *Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. ed. 934.)"

Chandler Caufield Co. v. *U. S.*, (9th Circuit Court of Appeals):

Here the court, considering Equity Rules 22 and 23, and section 274a of the Judicial Code, dealt with a situation substantially similar to the case at bar. The United States, undisputed owner of land, brought suit to enjoin a continuing trespass by the company which was removing oil therefrom. The company moved to transfer the case to the law side of the court. The defendant's answer alleged that the United States was not in possession, and that the action was in ejectment.

Hunt, Circuit Judge, in the opinion (p. 147) said:

> "Remedy at law for possession and to recover damages for the trespass is in plaintiff, but such remedy is not adequate, by no means as practical and efficient as a remedy in equity. (*Magruder* v. *Belle Fourche, etc., Association*, 219 Fed. 72, 135 C. C. A. 324. In *Johnson* v. *Corson G. M. Co.*, 157 Fed. 145, 84 C. C. A. 593, 15 L. R. A. (N. S.) 1078, there was a serious controversy as to title, hence the case is distinguished from the instant one.

"There is no controversy as to where the legal title to the property here involved rests, and if the defendants have no right to the oil in the lands or to the possession thereof as against the United States, then certainly remedy at law is inadequate to prevent injury of an irreparable character being done to the land, even to the destruction of the value thereof."

Though timely motion was made to transfer, equity rightfully retained jurisdiction. The decree of the District Court for injunction, for damages for trespass, and that all improvements be turned over to the United States (in effect, ejectment), was affirmed.

Twenty-one Mining Co. v. Original Sixteen-to-one Mining Co. (9th Circuit Court of Appeals):

"The original complaint in which the Twenty-one Mining Company was named as sole defendant contains all the essential averments of a bill to quiet title to said vein. * * * It is true that plaintiff has commenced an action at law against the defendant, but such action was not, as alleged, to recover possession of the property in dispute, but solely to recover damages for trespass thereon."

This is exactly the status of the case at bar. The only judgment sought in the plaintiff's first cause of action was a judgment for damages for the trespass.

(p. 727) "The defendants were seeking affirmative relief and the cause was submitted by all parties, not as one already determined by verdict or judgment in the action at law, or as depending upon the result of that action, but as *res integra*, upon which the independent judgment of the court was sought and which was to be decided, not upon the evidence adduced in the law case alone, but upon other additional and independent testimony as well. * * *

"It is not a case here of conferring jurisdiction on the court in a matter not of equitable cognizance. The court, as a court of equity, had and has jurisdiction to quiet title; the bill contains all the allegations necessary for that purpose, all the parties were properly before the court, and all acquiesced in the method of procedure. In such case neither party will be permitted, by the temporary withholding of objections until after the court has announced its decision, to place himself in such advantageous position that, winning, he can accept the fruits of victory, or, losing, escape the burdens of defeat. The decree appealed from therefore cannot be disturbed for lack of jurisdiction."

Hansell v. *Purnell* (6th Circuit Court of Appeals):

"Defendants, who by a cross bill invoke the equity jurisdiction of the court in relation to the same transactions to which the complainant's bill relates and pray for equitable relief, are estopped to deny equity jurisdiction."

Pacific Coal & Transportation Co. v. *Pioneer M. Co.* (9th C. C. A.):

"Now, the allegations of plaintiff's complaint show the action to be equitable. The defendants' denial of possession on the part of the plaintiff cannot oust the court of equity of jurisdiction. If the denial was substantiated at the trial, the issues there remaining, it would defeat the action, because plaintiff would not then have maintained its cause. But another feature is injected into the controversy here, which is controlling. The defendants have not only joined issue with the plaintiff touching the equitable cause as pleaded, but they have set up a like cause, and pray equitable relief, and at the same time they have interposed one or more equitable defenses. By so doing they have waived their objection to the equitable jurisdiction and cannot now be heard to insist upon the legal remedy. *Lee* v. *Evans*,

57 Fed. 677, 6 C. C. A. 500; *Book* v. *Justice Min. Co.*, (C. C.) 58 Fed. 827 * * *" (and other cases).

In *Fay* v. *Hill* (8th C. C. A.) it is held that failure to move to transfer a bill to the law side on the ground that there is a complete and adequate remedy at law, and proceeding to a hearing, is a waiver of the objection. (Syllabus, paragraph 2.) Also, that where an equitable defense is interposed in an action at law, it will have to be disposed of by the court sitting as a chancellor before the trial of the action at law to the jury. And also, a court of equity, having obtained jurisdiction of a suit wherein cancellation of contract for sale was sought, will retain the jurisdiction to dispose of *all controversies between the parties* arising out of the transaction.

Respondent has waived the right to object and is estopped by its actions to raise the question that the plaintiffs' action was at law. This is the clear pronouncement of the cases cited.

Can the appellate court disregard the waiver, revoke the estoppel, and refuse to determine the question presented, for the reasons assigned?

II.

The decision involves an important question of federal law which has not been, but should be, settled by this court.

The question is substantially as stated in the closing paragraph of the last proposition. No definite pronouncement of this court is found, unless it be in *Liberty Oil Co.* v. *Condon Bank*, hereafter referred to.

Stated otherwise, the question is the application of sections 274a and 274b, and Equity Rule 22, to the facts

at bar. We respectfully urge that this court should determine whether the transfer of causes contemplated can be accomplished by the appellate courts.

Section 274a is in these words:

"In case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form." (38 Stat. at L. 956.)

Section 274b:

"In all actions at law, equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same right in such case as if he had filed a bill embodying the defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject-matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree shall be regulated by rule of court. Whether such review be sought by writ of error or appeal, the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

Equity Rule 22:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the

> law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

By the petition, answer and reply, in our case the jurisdiction of equity was invoked. By the decree, equitable remedies alone were supplied. If this was not an equity case, nevertheless the defendant has waived the right to raise the question. Now, if it can be raised by the appellate court for the first time, *sua sponte*, Equity Rule 22 and section 274a are mere pitfalls to entrap the unwary litigant. The spirit of this section and rule is emphatically non-technical, yet it would be better to repeal them if they contemplate a transfer by the appellate court. Substantially, that is what the Circuit Court of Appeals accomplished here—a transfer from equity to law.

From *Indian Land & Trust Co.* v. *Shoenfeldt*, 135 Fed. 484, we quote:

> "Prior to this enactment [Rule 22] a suit erroneously commenced on the equity side must be dismissed on motion of defendant or by the court. • • •
>
> "When a court of equity had no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law for any damages he may sustain if he is so advised."

Under the rule, however, if the opinion of the Eighth Circuit Court is correct, when a case is erroneously docketed and tried in equity, no opportunity is afforded to refile when the error is discovered. The appellate court determines the one question, that the litigant s e l e c t e d the

wrong branch of the court, and the case is at an end. This is one error of the trial court which can operate to the disadvantage of the losing party only, and for which the decision is not reversed, but affirmed.

However, if "a suit in equity should have been brought at law" under section 274a, "any party should have the right, *at any stage of the proceedings*, to amend his pleadings" to obviate that objection. If this right had been granted us, the only amendment essential was that established by the trial court's decree—the dismissal of the bill. Then both parties would have been before the court on the prayers to quiet title. One or the other was in possession, therefore equity was the proper remedy. No such opportunity could be afforded us in the appellate court, because "the cause shall proceed and be determined upon such amended pleadings." Clearly the transfer must be made in the District Court, and if not so made, the consequent questions of procedure are waived.

It is important that this court determine the question whether this rule and these sections shall be construed to simplify or to complicate federal practice.

Liberty Oil Company v. *Condon National Bank*, 260 U. S. 235, 67 L. ed. 232, is persuasive that the present decision of the Circuit Court of Appeals is erroneous. The Eighth Circuit Court of Appeals held (271 Fed. 928) that the action was a suit at law, and that, as the bill of exceptions showed no special findings of fact in a cause in which a jury had been waived, but only a general finding for the interveners, the court would not consider the sufficiency of the evidence to sustain the finding. The action was docketed as at law, for money had and received. The defendant

bank, claiming to be a mere stakeholder, asked that other persons be brought in as defendants, and their rights adjudicated. The opinion by Mr. Chief Justice TAFT states that "its answer and cross petition became an equitable defense and a prayer for affirmative equitable relief in the nature of a bill for interpleader."

After citing section 274b of the Judicial Code, the opinion proceeds:

> "This section applies to the case before us. The proceeding was changed by defendant's answer and cross petition from one at law to one in equity, *with all the consequences flowing therefrom.*"

The court suggests that a better practice would have been to transfer the cause to the equity docket as provided conversely in Rule 22. But the failure to transfer did not change the equitable character of the case which "it had taken on by the answer and cross petition of the defendant. The situation thus produced was quite like that under state civil codes of procedure in which there is but one form of civil action, the formal distinction between proceedings in law and equity is abolished, and remedies at law and in equity are available to parties in the same court and the same cause." *In other words, the suit was an equitable action because the answer of the defendant made it so.*

The opinion then points out that while these sections (274a and 274b) of the Judicial Code "did not create one form of civil action as do the codes of procedure in the states," yet they

> "manifest a purpose on the part of Congress to change from a suit at law to one in equity, and the reverse,

with as little delay and as little insistence on form as possible, and are long steps toward code practice.

"Coming now to apply those two sections thus construed to the case before us, we find that by defendant's answer and the court's order it became a bill of interpleader in equity. Thereafter the proceedings should have been so treated, both in the trial and appellate courts. The chancellor, having sustained a bill of interpleader, disposed of the controversy between the claimants by directing any method of trial which would best and expeditiously accomplish justice in the particular case (citing cases). This well established rule takes the issues here to be tried out of that class of issues in which there must have been a jury trial under the Seventh Amendment. Where it was one which the chancellor could readily dispose of in one proceeding, it was in the interest of economy, expediency and justice that he should have done so. This is in accord with the general rule in equity embodied in Equity Rule 23, that jurisdiction once assumed should be maintained to the end of the litigation (citing cases)."

This is in accord with the decisions in:

Hansell v. *Purnell*, 1 Fed. (2nd) 266, 8th C. C. A.;

Pacific Coal & Transportation Co. v. *Pioneer Mining Co.*, 205 Fed. 577, 9th C. C. A.;

Vidal v. *Co.*, 276 Fed. 856-7, 2nd C. C. A., syllabus, par. 13;

Fay v. *Hill*, 249 Fed. 415, 8th C. C. A.

We also call attention to the agreed statement of fact in the instant case, which presented for the appellate court a question of law, and not of fact.

—*Ford* v. *Grimmett*, 278 Fed. 140.

III.

The decision is in conflict with the decisions of the Supreme Court of Oklahoma, and involves property rights of value within the jurisdiction of that court.

The petitioners, Cherokee Indian allottees, were wards of the United States, and restricted during minority.

—*Truskett* v. *Closser*, 236 U. S. 223.

The power to lease, on the date specified, was conferred by section 6 of the Act of May 27, 1908 (35 Stat. at L. 312), on the probate courts of the state. These courts become federal instrumentalities for the removal of this restriction, but the procedure for leasing was to be prescribed by the state alone. The right to regulate procedure includes the power to enforce compliance, and implies jurisdiction to determine the effect of non-compliance.

Section 2, article 7, of the Oklahoma Constitution, is in part as follows:

> "The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all commissions and boards created by law."

By request of the Interior Department of the United States (see report, Commissioner Indian Affairs, 1914, pp. 50-55) the Supreme Court of Oklahoma promulgated certain rules for the control of the probate courts, Rule 9 being in these words:

> "No oil and gas or other mineral lease covering lands belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed at least five

> days before the same are sold, as provided herein, and notice of such sale must be given by posting and by publication, where publication is practicable, and shall be on ..... of each ....."

In October, 1915, the rules were construed by the Supreme Court of Oklahoma. They were said to be local statutes, of the same effect as if enacted by the legislature. It was held that the probate courts had no power or authority, that is to say, no jurisdiction, to ignore or dispense with these rules.

—*Freeling* v. *Kight*, 49 Okl. 202, 152 Pac. 362.

The extension leases here involved were taken in 1916 (R. 23). The local law at that time as announced in *Freeling* v. *Kight* was in force, and known to respondent. Yet Rule 9 was deliberately violated in that *(1)* no public sale was had to the highest and best bidder; and *(2)* the so-called notice of sale, instead of giving the unqualified announcement that a sale would be conducted on a given date, announced that a hearing would then be held to determine the question of the propriety of such a sale.

At the time the "notice of sale" was posted, no order of sale had been made. No notice could be given till the authority had been granted. The casually interested investor must have been misled by the notice and competition thus prevented. The reason is obvious. The properties (in all the cases) were purchased for $18,(illegible); they were sold shortly after for $250,(illegible). All arrangements for the sale, even to the smallest detail, were made prior to the filing of the petition. The record does not disclose a public sale, but a mere confirmation by the court of the former private agreement.

Such sales are held absolutely void as against the public policy of the State of Oklahoma, in

Winona Oil Co. v. *Barnes*, 83 Okl. 248, 200 Pac. 981;
Carlile v. *National Oil & Development Co.*, 83 Okl. 217, 201 Pac. 377.

It is held that the probate courts have no jurisdiction to order or confirm a transaction of this character.

The federal courts are bound by the local construction of state laws, especially when the interpretation antedates the transaction involved, and this is particularly true where the jurisdiction of inferior state tribunals is the subject in question.

Kuhn v. *Fairmount Coal Co.*, 215 U. S. 349;
St. L. & S. F. Railroad Co. v. *Quinette*, 251 Fed. 773;
Messenger v. *Anderson*, 225 U. S. 436;
Barnett v. *Kunkel*, 259 Fed. 394;
Commercial Bank v. *Buckingham*, 5 How. 317, 12 L. ed. 169;
Balkham v. *Woodstock Iron Co.*, 154 U. S. 177;
Leffingwell v. *Warren*, 67 U. S. 599;
Standard Oil Co. v. *Missouri*, 224 U. S. 270;
Freeport Water Co. v. *Freeport*, 180 U. S. 587.

In a sense Rule 9 is a federal restriction upon the alienation of Indian land. The sovereign guardian of the petitioner procured its enactment by the state court. It was designed to prevent the existence of the situation here presented. It should therefore be so construed as to destroy the evil at which it was aimed. It is of no value unless its violation shall invoke a penalty. The penalty prescribed is

not confiscatory, since the decisions require reimbursement for the expense of development.

—*Barnes* v. *Winona Oil Co.*, 83 Okl. 253, 200 Pac. 985.

Conveyances violating federal restrictions generally are held void, and this should furnish an additional reason for following the local decisions here.

—Act May 27, 1908, Sec. 5;
Truskett v. *Closser*, *supra*;
Heckman v. *U. S.*, 224 U. S. 413;
Goat v. *U. S.*, 224 U. S. 458.

As shown by the record, the amount involved is such that it is probable either party will seek a final decision by this court. If the cause shall be remanded to the Circuit Court with instructions to determine the merits, the litigation will be unduly prolonged. Therefore, we urge in the interest of expediency that the matter be heard and determined on its merits by this court in the present state of the record.

—*Liberty Oil Co.* v. *Condon National Bank*, *supra*.

Respectfully submitted,

James S. Watson,
D. Haden Ijnerbaugh,
Paul Pinson,
Attorneys for Petitioners.